IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,	)	**No. 27244-3-III**
Respondent,	)	
	)	**Division Three**
v.	)	
	)	
ALEJANDRO HERRERA-CASTRO,	)	**UNPUBLISHED OPINION**
	)	
Appellant.	)	
	)	

Brown, J.—On merger grounds, Alejandro Herrera-Castro appeals three first degree kidnapping convictions involving three different victims that were based upon a jury finding that their abduction facilitated the second degree kidnapping of a fourth victim, Ana Suarez. We reject Mr. Herrera-Castro's merger contentions, and affirm.

FACTS

Ms. Suarez, Luis E.G. Suarez, Juan M. Suarez (sister and brothers), and (their cousin) Mr. Juan Ibarra Suarez lived together in a trailer in Mattawa, Washington. According to Mr. Ibarra Suarez, in the late evening of July 12, 2007, while Mr. Ibarra Suarez was lying in bed, Mr. Herrera-Castro entered the trailer door uninvited while

armed with a gun, yelling, and looking angry. Mr. Herrera-Castro pointed the gun at Ms. Suarez, Luis,[1] and Juan. Mr. Herrera-Castro said he loved Ms. Suarez and wanted her to come with him. Ms. Suarez refused. Mr. Herrera-Castro said he would take her anyway, and that if she did not go with him, there would be blood, and that he would shoot anyone that got in his way. Luis, Juan, and Mr. Ibarra Suarez tried to talk Mr. Herrera-Castro out of taking Ms. Suarez, pointing out that he was already married.

Ms. Suarez eventually agreed to go with Mr. Herrera-Castro, if accompanied by Mrs. Herrera-Castro, who was not present. Mr. Herrera-Castro pointed the gun at Mr. Ibarra Suarez when he tried to get up as Mr. Herrera-Castro was taking Ms. Suarez away. As Mr. Herrera-Castro was pulling Ms. Suarez away from the trailer, Mattawa Police Chief Steve Jensen, who had arrived to investigate, used his taser to stop Mr. Herrera-Castro.

The State charged Mr. Herrera-Castro with four counts of first degree kidnapping, four counts of second degree assault, and four counts of felony harassment – threats to kill, with one count of each offense against Ms. Suarez, Luis, Juan, and Mr. Ibarra Suarez.

Mr. Ibarra Suarez explained at trial, "[Ms. Suarez] was frightened, but she wanted to go with [Mr. Herrera-Castro] so that we could do something." 1 Report of Proceedings (RP) (Oct. 10, 2007) at 64. Mr. Ibarra Suarez related Mr. Herrera-Castro

[1] For ease of reference, we refer to Luis E.G. Suarez and Juan M. Suarez by their first names. We intend no disrespect.

told Ms. Suarez he would shoot her if she ran away from him. He testified Mr. Herrera-Castro was in the trailer for "an hour and a half, maybe two hours." 1 RP (Oct. 10, 2007) at 72.

Chief Jensen testified he arrived at the trailer at 11:40 p.m. He observed the trailer door was partially open, and he heard one person yelling inside. He testified he stood outside the trailer, and was able to look inside through the broken blinds of a window. Chief Jensen testified he observed an individual, later identified as Mr. He, inside the trailer, with a gun in his hand. He testified he then observed Mr. Herrera-Castro in a confrontation with an individual lying on a bed, and that he could no longer see the gun, but he perceived that the gun was on Mr. Herrera-Castro's right hip, covered with his shirt. Chief Jensen testified the individual lying on the bed was on his left side, in a fetal position, and appeared very frightened and concerned. He further testified Mr. Herrera-Castro was over this individual, yelling at him.

Chief Jensen testified he could see that two more people were present. When Mr. Herrera-Castro stepped out of the trailer, "[h]e had with him a female by the arm," later identified as Ms. Suarez. 2 RP (Oct. 11, 2007) at 152. Chief Jensen explained how he used his taser to stop Mr. Herrera-Castro and how he recovered a gun in a holster on Mr. Herrera-Castro's right hip. Chief Jensen related Ms. Suarez appeared very shaken and rattled.

Mattawa Police Officer Jose Chiprez testified he arrived at the trailer after Mr.

Herrera-Castro had been arrested. Officer Chiprez testified he contacted Ms. Suarez, and that she appeared frightened, shaking, and trembling.

At the close of the State's case, Mr. Herrera-Castro unsuccessfully moved in part to dismiss the first degree kidnapping counts against Luis, Juan, and Mr. Ibarra Suarez. The State acknowledged its case theory was that Mr. Herrera-Castro committed first degree kidnapping against the three by abducting them with the intent to facilitate commission of a felony, specifically, the kidnapping of Ms. Suarez. In response, Mr. Herrera-Castro argued, "I don't think that's what the statute intends." 2 RP (Oct. 11, 2007) at 202-03. The trial court denied Mr. Herrera-Castro's motion. The court granted the State's motion to dismiss three of the felony harassment counts, regarding Ms. Suarez, Luis, and Juan.

Jury Instruction No. 19 defined first degree kidnapping:

> A person commits the crime of kidnapping in the first degree when he or she intentionally abducts another person with intent to facilitate the commission of kidnapping first degree of a third person or kidnapping second degree of a third person or unlawful imprisonment of a third person.

Clerk's Papers (CP) at 129. Jury Instruction No. 20 provided that in order to convict Mr. Herrera-Castro of first degree kidnapping of Luis, the followings elements must be proved beyond a reasonable doubt:

> (1) That on or about July 12, 2007, [Mr. Herrera-Castro] intentionally abducted another person, to wit: Luis E.G. Suarez;
> (2) That [Mr. Herrera-Castro] abducted that person with intent to facilitate the commission of kidnapping first degree of a third person or kidnapping second degree of a third person or unlawful

imprisonment of a third person;
(3) That any of these acts occurred in State of Washington [sic].

CP at 130. Jury Instruction No. 24 and 28 provided similar "to convict" instructions regarding Juan and Mr. Ibarra Suarez. Mr. Herrera-Castro did not object to Jury Instruction Nos. 19, 20, 24, or 28.

The jury found Mr. Herrera-Castro guilty of nine crimes: second degree kidnapping of Ms. Suarez; first degree kidnapping of Luis, Juan, and Mr. Ibarra Suarez; second degree assault of Ms. Suarez, Luis, Juan, and Mr. Ibarra Suarez; and gross misdemeanor harassment of Mr. Ibarra Suarez. The trial court sentenced Mr. Herrera-Castro to standard range sentences, with the sentences to run concurrently except for consecutive sentencing of the three first degree kidnappings. Mr. Herrera-Castro appealed.

ANALYSIS

A. Merger Doctrine

The issue is whether the three first degree kidnapping convictions violate the merger doctrine. Mr. Herrera-Castro contends, for the first time on appeal, that the second degree kidnapping conviction involving Ms. Suarez cannot be used to support the first degree kidnapping convictions involving Luis, Juan, and Mr. Ibarra Suarez.

The Fifth Amendment and article I, section 9 of the Washington State Constitution, prohibit multiple punishments for the same offense. *State v. Kier*, 164 Wn.2d 798, 803, 194 P.3d 212 (2008). "Where a defendant's act supports charges

under two criminal statutes, a court weighing a double jeopardy challenge must determine whether, in light of legislative intent, the charged crimes constitute the same offense." *Id*. at 803-04 (internal quotation marks omitted) (quoting *State v. Freeman*, 153 Wn.2d 765, 771, 108 P.3d 753 (2005)). "[T]he merger doctrine is simply another means by which a court may determine whether the imposition of multiple punishments violates the Fifth Amendment guarantee against double jeopardy." *State v. Frohs*, 83 Wn. App. 803, 811, 924 P.2d 384 (1996); *see also Freeman*, 153 Wn.2d at 772 (stating, "if applicable, the merger doctrine is another aid in determining legislative intent.").

We review de novo whether the merger doctrine applies. *State v. Williams*, 131 Wn. App. 488, 498, 128 P.3d 98 (2006), *adhered to on remand*, 147 Wn. App. 479, 195 P.3d 578 (2008). Because the merger doctrine arises from constitutional double jeopardy principles, Mr. Herrera-Castro's merger challenge is a constitutional claim that may be addressed for the first time on appeal. RAP 2.5(a)(3); *Frohs*, 83 Wn. App. at 811 n.2.

The merger doctrine is "a doctrine of statutory interpretation used to determine whether the Legislature intended to impose multiple punishments for a single act which violates several statutory provisions." *State v. Vladovic*, 99 Wn.2d 413, 419 n.2, 662 P.2d 853 (1983) (citing *Blockburger v. United States*, 284 U.S. 299, 52 S. Ct. 180, 76 L. Ed. 306 (1932)). The merger doctrine applies solely under the following circumstances:

[W]here the Legislature has clearly indicated that in order to prove a

> particular degree of crime . . . the State must prove not only that a defendant committed that crime . . . but that the crime was accompanied by an act which is defined as a crime elsewhere in the criminal statutes.

Id. at 420-21.

First degree kidnapping occurs when:

> (1) A person . . . intentionally abducts another person with intent:
> (a) To hold him for ransom or reward, or as a shield or hostage; or
> (b) *To facilitate commission of any felony or flight thereafter*; or
> (c) To inflict bodily injury on him; or
> (d) To inflict extreme mental distress on him or a third person; or
> (e) To interfere with the performance of any governmental function.

RCW 9A.40.020(1) (emphasis added).

Here, the jury was instructed on first degree kidnapping, pursuant to RCW 9A.40.020(1)(b), that the State had to prove that Mr. Herrera-Castro intentionally abducted each person, with the intent to facilitate the commission of first degree kidnapping, second degree kidnapping, or unlawful imprisonment of a third person. Based on the jury verdict, the facilitated crime appears to be the second degree kidnapping of Ms. Suarez. Thus, Mr. Herrera-Castro contends, under the merger doctrine, the second degree kidnapping conviction of Ms. Suarez cannot be used to support the first degree kidnapping convictions involving Luis, Juan, and Mr. Ibarra Suarez.

In *In re the Personal Restraint of Fletcher*, the defendant pleaded guilty to first degree kidnapping, first degree robbery, and first degree assault of one woman. *In re Pers. Restraint of Fletcher*, 113 Wn.2d 42, 44-45, 776 P.2d 114 (1989). In his

statement on plea of guilty, the defendant stated that he and an accomplice kidnapped two women in order to steal their car. *Id*. at 45. In a personal restraint petition, the defendant partly argued that his sentences should be vacated under the merger doctrine. *Id*. at 50. In considering whether the first degree robbery conviction merged into the first degree kidnapping conviction, our Supreme Court stated that the first degree kidnapping statute "only requires proof of *intent* to commit various acts, some of which are defined as crimes elsewhere in the criminal code." *Id*. at 52 (emphasis in original). The court further stated that the statute "does not require that the acts actually be committed." *Id*. (citing RCW 9A.40.020). The court reasoned:

> A reading of the statute makes it clear that the person who intentionally abducts another need do so only with the *intent* to carryout one of the incidents enumerated in RCW 9A.40.020(1)(a) through (e) inclusive; not that the perpetrator actually bring about or complete one of those qualifying factors listed in the statute.

Id. at 52-53 (emphasis in original). Thus, the court found that "the Legislature has not indicated that a defendant must also commit another crime in order to be guilty of first degree kidnapping, and therefore the merger doctrine does not apply." *Id*. at 53. Accordingly, the court concluded that the defendant could be punished separately for the first degree kidnapping and first degree robbery convictions. *Id*.

In *State v. Louis*, our Supreme Court adhered to the *Fletcher* rule, concluding that the defendant could be separately punished for first degree robbery and first degree kidnapping. *State v. Louis*, 155 Wn.2d 563, 570-71, 120 P.3d 936 (2005). The

court concluded that "the legislature has not indicated that a defendant must . . . commit armed robbery before he or she can be convicted of first degree kidnapping." *Id*. at 571.

Given *Fletcher*, the merger doctrine does not apply. The first degree kidnapping statute does not require that second degree kidnapping actually be committed. *See Fletcher*, 113 Wn.2d at 52-53. This is not an instance "where the Legislature has clearly indicated that in order to prove a particular degree of crime," specifically, first degree kidnapping, "the State must prove not only that a defendant committed that crime . . . but that the crime was accompanied by an act which is defined as a crime elsewhere in the criminal statutes," specifically, second degree kidnapping. *Vladovic*, 99 Wn.2d at 420-21.

Mr. Herrera-Castro next contends the restraint of Luis, Juan, and Mr. Ibarra Suarez was "merely incidental" to the second degree kidnapping. Mr. Herrera-Castro alludes to a merger exception, "that if the offenses committed in a particular case have independent purposes or effects, they may be punished separately." *Vladovic*, 99 Wn.2d at 421. Even if the merger doctrine applies, both convictions can stand if the merged conviction "involved 'some injury to the person or property of the victim or others, which is separate and distinct from and not merely incidental to the crime of which it forms an element.'" *Id*. (quoting *State v. Johnson*, 92 Wn.2d 671, 680, 600 P.2d 1249 (1979), *overruled on other grounds by State v. Sweet*, 138 Wn.2d 466, 980

P.2d 1223 (1999)).

But, in order for this exception to apply, the merger doctrine itself must first apply. At this juncture, Mr. Herrera-Castro curiously argues the three first degree kidnapping convictions merge into the second degree kidnapping conviction. However, it is well settled that the less serious crime merges into the more serious crime, not the other way around. Considering all, we reject Mr. Herrera-Castro's contention without further analysis, except to note that the merger doctrine would not apply in any event because the three first degree kidnapping convictions and the second degree kidnapping conviction involve different people. *See Vladovic*, 99 Wn.2d at 421 (where the injuries involved in a first degree robbery and four first degree kidnappings "involved different people, they clearly created separate and distinct injuries," and therefore, robbery conviction did not merge into the kidnapping convictions); *see also State v. Hudlow*, 36 Wn. App. 630, 633, 676 P.2d 553 (1984) (stating that "[c]rimes against different victims clearly seem to satisfy [the] 'independent purpose or effect' test").

Mr. Herrera-Castro next contends insufficient evidence supports the three first degree kidnapping convictions, citing *State v. Saunders*, 120 Wn. App. 800, 86 P.3d 232 (2004). In *Saunders*, the court acknowledged several cases finding that the "merger doctrine analysis is not relevant to a sufficiency of the evidence challenge." *Saunders*, 120 Wn. App. at 817 (citing *State v. Harris*, 36 Wn. App. 746, 754, 677 P.2d

202 (1984); *State v. Whitney*, 44 Wn. App. 17, 20, 720 P.2d 853 (1986)). But the court stated, "courts reviewing kidnap charges as predicate offenses to other charges frequently borrow merger analysis in discussing sufficiency of the evidence and vice versa." *Id*.

Here, unlike the cases cited in *Saunders*, the first degree kidnapping convictions did not require proof of kidnapping as a predicate offense. *See Fletcher*, 113 Wn.2d at 52-53. The State was not required to prove the second degree kidnapping in order to prove first degree kidnapping. Mr. Herrera-Castro does not otherwise challenge evidence sufficiency for the first degree kidnapping convictions. Therefore, we reject his evidence sufficiency challenge.

Finally, Mr. Herrera-Castro contends, "[t]he jury instructions in this case were fatally flawed, and violated Mr. Herrera-Castro's right to be free from double jeopardy." Appellant's Br. at 12-13. Other than this single sentence, Mr. Herrera-Castro makes no other argument in support of this contention. Notably, "when offenses harm different victims, the offenses are not factually the same for the purposes of double jeopardy." *State v. Baldwin*, 150 Wn.2d 448, 457, 78 P.3d 1005 (2003) (citing *State v. McJimpson*, 79 Wn. App. 164, 169, 901 P.2d 354 (1995)). Therefore, because the first degree kidnapping offenses involved different victims, the jury instructions related to the offenses did not violate double jeopardy. *See id.*

B. Additional Grounds

In his statement of additional grounds for review, Mr. Herrera-Castro asks us consider that he has young children, and his wife needs help raising them. Nothing in the record supports his argument. And, he identifies no legal error at the trial level. Therefore, acknowledging his personal concern, we cannot provide review.

Affirmed.

A majority of the panel has determined the opinion will not be printed in the

Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

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Brown, J.

WE CONCUR:

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Sweeney, J.

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Korsmo, J.